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Supreme Court of the United States

October Term, 1932.

No. [redacted] 33

ADVANCE-RUMLEY THRESHER COMPANY, INC.,
Appellant,

vs.

A. M. JACKSON,
Appellee.

APPELLEE'S BRIEF.

JACOBSON & MURRAY and WILLIAM LEMKE,
Attorneys for Appellee.

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Supreme Court of the United States

October Term, 1932.

No. 849.

ADVANCE-RUMLEY THRESHER COMPANY, INC.,

Appellant,

vs.

A. M. JACKSON,

Appellee.

APPELLEE'S BRIEF.

The facts in this case are set forth in the complaint and in the answer and in the decision of the Supreme Court of the State of North Dakota. The plaintiff demurred to the alleged separate defenses of the defendant's answer. The demurrer being sustained, judgment was given upon the pleadings in favor of the plaintiff.

APPELLEE'S STATEMENT OF THE CASE.

Plaintiff brought this action for rescission of a contract under the terms of which the plaintiff purchased from the defendant a certain harvester-combine. In his complaint he alleges that on or about August 13, 1928, he purchased from the defendant a certain harvester-combine and that in payment thereof he executed and delivered to the plaintiff three certain promissory notes; that said machine was purchased for the personal use of the plaintiff in the harvesting and threshing of grains on farm lands in this state, all of which was known to the defendant; that the machine was unfit, and did not properly perform the work, for which it was purchased; that it was defective in workmanship and material and could not be made to operate successfully; that on or about September 5, 1928, plaintiff rescinded the purchase and gave notice of such rescission to the defendant and the agent who had negotiated the sale and that the machine had been placed at the disposal of the defendant as its property, and demanded a return of the promissory notes; that the defendant rejected the offer and refused to surrender the notes or to accept redelivery of the machine; that by virtue of the provisions of Chapter 238, page 483, of the Session Laws of North Dakota for the year 1919 plaintiff had a reasonable time after the delivery of the machine to inspect and test the same; that it was so inspected and tested within a reasonable time after delivery and proved unfit for the purpose for which it was purchased and that the sale was duly rescinded in conformity with the provisions of said Chapter 238, page 483, Laws 1919 and that plaintiff is entitled to a return and redelivery of said promissory notes. The defendant is a foreign corporation duly licensed to do business in the State of North Dakota (See complaint, Tr. Folios 2 to 5 inclusive, pages 1 to 4 inclusive).

The defendant interposed an answer wherein it admitted the facts set forth in the complaint, and then asserted that Chapter 238, page 483, Laws 1919, is unconstitutional in this, that it interferes with the freedom of contract; imposes an arbitrary and unreasonable burden upon business; deprives the defendant of its property and its right to contract without due process and denies to it the equal protection of the laws, all in violation of the guarantees of the Fourteenth Amendment to the Constitution of the United States.

The answer further alleged:

> "The plaintiff contracted and agreed that said machine was purchased without warranty of any kind, with respect to material or workmanship, fitness for the purpose of purchase, or otherwise, and that plaintiff as such purchaser would and did waive any and all warranties of every kind, express, implied or statutory, and all right to claim or demand any remedy for the breach thereof, and did agree unconditionally to pay the purchase price of said machine as represented by the promissory notes described in the complaint." (See Answer, Tr. Folios 7 to 9, inclusive, pages 4 and 5).

The plaintiff demurred to this answer. The demurrer was sustained and judgment was entered in favor of the plaintiff (Tr. Folios 10 to 14 inclusive, pages 6 to 8 inclusive).

Chapter 238, page 483, Laws 1919, so far as material here, provides:

> Sec. 1. "Any person * * * purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery for their own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased the purchaser may rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such ma-

chinery was purchased, or the agent who negotiated the sale or made delivery of such personal property or his successor, and placing the same at the disposal of the seller.

Sec. 2. Any provision in any written order or contract of sale, or other contract which is contrary to any of the provisions of this Act is hereby declared to be against public policy and void."

QUESTION FOR DETERMINATION.

The sole and only question to be determined by this Court is the constitutionality of Chapter 238 of the Session Laws of the State of North Dakota for the year 1919. Appellant admits in his answer that the appellee is entitled to the relief demanded if Chapter 238 of the Session Laws of the State of North Dakota of 1919 is not void and unconstitutional (Tr. Folio 7, page 4).

ARGUMENT.

The history and the reason for this legislation is set forth by the Supreme Court in its opinion as follows:

> "The objects sought to be accomplished by the enactment of this statute are clearly enunciated in the statute itself. They are to obtain for the purchaser of machinery of the kind described in the statute 'a reasonable time after delivery for the inspection and testing of the same;' and if it did 'not prove to be reasonably fit for the purpose for which it was purchased', to afford the purchaser the right to 'rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such property or his successor and placing the same at the disposal of the seller'. At the time of the enactment of the statute, and during the entire history of the state prior thereto, the production of grain was and had been the basic industry of the state. Contracts for the purchase of machinery to be utilized in the production of grain were in a very real sense the most important contracts in the state. All machinery so purchased and used in this state was manufactured outside the state—the different manufacturers and distributors maintaining offices and employing sales agents within the state. The sales contracts were prepared by the seller. As a rule there was no opportunity for the purchaser to inspect the machinery at the time the contract was signed by him. Generally the contracts were in the form of an order containing extended provisions having a tendency to restrict the rights of the purchaser and the liability of the seller. In some cases such contracts contained provisions waiving all warranties, in others the warranties were so limited as to be of little or no value, such, for instance, as providing that machinery was 'warranted only against breakage caused by manifest defects in material' and thus exclud-

ing all other warranties, both expressed and implied. Of course, tractors, harvesting and threshing machinery could be tested only during the proper season, that is harvesting machinery could be tested only during the harvest season and threshing machinery could be tested only during the threshing season. It was of vital importance to the people of the state that farm machinery should be fit for the purpose for which it was sold. If it failed to work and other machinery must be obtained it was essential that the purchaser should be in position to do so at once as the delay of only a few days might result in the loss of the entire crop. While the farmers in purchasing machinery dealt with agents in this state, the contracts frequently, if not generally, contained provisions to the effect that in the event the machinery failed to comply with the warranties, written notice of this fact must be given directly to the seller at its head office within a stipulated number of days or hours after the delivery of the machine. The records of this court show that in many cases purchasers of machinery, finding it to be defective, in good faith notified the agent from whom they purchased it, or the general agent, or both, but failed to notify the head office within the time stipulated in the contract and, consequently, lost the right to assert the breach of warranty.

"It is a matter of common knowledge that machinery of the kinds enumerated in the statute, much of it wholly experimental in character, was sold in large quantities in North Dakota and that in numerous cases the purchasers, on account of provisions in the sales contracts of the nature alluded to above, were required to pay for machinery that was wholly useless. In many instances farmers who purchased such machinery lost their farms as a result of the financial obligations assumed by them under the contracts. The members of the legislature were, of course, fully aware of this situation. They were confronted with a condition and not with a theory and so in order to remedy that condition they enacted Chapter 238, Laws 1919,

so as to assure to every purchaser of machinery of the kind described in the statute, a reasonable opportunity to test the same, coupled with a right to rescind the contract if, upon such test, the machinery was found to be unfit for the purpose for which it was purchased. And, further, to permit such purchaser to give notice of the defects in the machinery and of the rescission of the contract to the representative of the company from whom the machinery had been purchased or his successor. The legislature recognized the necessity of legislation of this nature long before the enactment of Chapter 238, Laws 1919. See Chapters 218-219, Laws 1913.

"Viewed from a practical as distinguished from a legalistic standpoint it is apparent that Chapter 238, Laws 1919 has not imposed any conditions upon the purchase and sale of farm machinery that seriously interfere with such business in this state. The law became effective July 1, 1918, and since that time has affected all contracts for the purchase and sale in this state of machinery of the kind described in the statute. Minneapolis Threshing Machine Co. v. Hocking, 54 N. D. 559, 209 N. W. 996. And, although there apparently has been a substantial decrease in litigation concerning farm machinery, cases have arisen involving the construction and application of the statute (See Minneapolis Threshing Machine Co. v. Hocking, 54 N. D. 559, 209 N. W. 996; Palaniku v. Allis-Chalmers Mfg. Co., 57 N. D. 199, 220 N. W. 638; Allis-Chalmers Mfg. Co. v. Frank, 57 N. D. 295, 221 N. W. 75; Dwinnell v. Boehmer, 60 N. D. 302, 234 N. W. 655; Bratberg v. Advance-Rumley Thresher Co., ——N. D.——, 238 N. W. 552; Holden v. Advance-Rumley Thresher Co., ——N. D.——, 239 N. W. 479; Jesperson v. Advance-Rumley Thresher Co., ——N. D.——, 240 N. W. 876); but the validity of the law was first drawn in question in Bratberg v. Advance-Rumley Thresher Co., supra, which involved a contract made more than eight years, and litigation which arose more than ten years, after the law had become effective."

We will take it for granted that this Court will take the reasons, purpose and necessity of this legislation from the highest court in the State of North Dakota rather than from the assertions of counsel for appellant in his brief. Under the laws of the State of North Dakota the Supreme Court has power to take judicial notice of the following facts:

> "That the case before the court had connection with one formerly decided by it."

Sub-Section 14, Section 7937, page 1894, 1913 Compiled Laws of North Dakota.

> "That the facts left in issue being, facts of which the court will take judicial notice, are deemed part of the pleadings and not matters of evidence."

Sub-Section 18, Section 7937, page 1894, 1913 Compiled Laws of North Dakota.

> "Of its own records and judgments."

Sub-Section 19, Section 7937, page 1894, 1913 Compiled Laws of North Dakota.

> "Of the course of the seasons and of husbandry."

Sub-Section 7, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

> "Of whatever ought to be generally known within the limits of the court's jurisdiction."

Sub-Section 30, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

> "Of matters of public history affecting the whole people."

Sub-Section 33, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

> "Of what is commonly known in the various manufactures and industries."

Sub-Section 39, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

> *"Of such contemporaneous history as led up to and probably induced the passage of the law."*

Sub-Section 60, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

> "Of the history of every statute in its progress through the legislature."

Sub-Section 61, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

> "Of such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence."

Sub-Section 68, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

> "Of the laws of nature."

Subsection 76, Section 7938, page 1895, 1913 Compiled Laws of North Dakota.

Necessity of Chapter 238, Laws 1919.

The necessity—and purpose for the enactment—of chapter 238, page 483, 1919 Session Laws of North Dakota, are clearly set forth in that portion of the opinion of the Supreme Court of North Dakota above quoted. Under these circumstances it is clear that Chapter 238, of the 1919 Session Laws of North Dakota, does not contravene and is not in violation of the 14th Amendment of the Constitution of the United States. It is merely a necessary regulation to prevent fraud and misrepresentation in the sale of that class of farm machinery enumerated in said Chapter 238, laws 1919. It does not deprive appel-

lant of property, but compels it to be honest with the purchaser and to sell him only that class of machinery which is reasonably fitted for the purpose for which it was purchased.

A statute, which has for its object honesty and fair dealing between individuals who stand in the relation to each other of the appellant and appellee, is not in violation of the 14th Amendment of the Constitution of the United States, but in strict conformity with it. The 14th Amendment has never been held a protector of fraud to the extent of permitting high-pressure salesmen to sell to farmers farm machinery not reasonably fitted for the purpose for which it was purchased.

To prevent such a sale, or to allow its rescission, is simply common sense honesty, and to prevent one from perpetrating a fraud is not depriving him of property within the meaning of the 14th Amendment of the Constitution of the United States. This amendment does not guarantee to a citizen the right to contract, either by himself or agent, within his state, in violation of its laws. Hooper v. Calif., 155 U. S. 648. Nor does it give immunity from reasonable regulation to safeguard the people's interest. Miller v. Wilson, 236 U. S. 373; Knoxville Iron Co. v. Harbison, 183 U. S. 22. The regulation of trade, business or profession is within the domain of the police power; such regulation may more or less restrict liberty or impair the value of property, but if reasonably calculated to produce the end contemplated is constitutional. Soon Hing v. Crowley, 113 U. S. 708; Gundling v. Chicago, 177 U. S. 188; Nutting v. Massachusetts, 183 U. S. 553. A statute prohibiting a stipulation against liability for negligence in the delivery of an interstate message is not invalid as a deprivation of liberty to contract. Western Union v. Commercial Million Co., 218 U. S. 406.

The Supreme Court, in its opinion in the instant case, says:

> "We deem it unnecessary to restate at length in this opinion the reasons for the conclusions announced by us in Bratberg v. Advance-Rumley Thresher Company to the effect that the statute does not infringe upon any of the constitutional guarantees invoked by the appellant. It is sufficient to say that we still adhere to the views there expressed."

(Tr. Folio 31, page 17).

In the Bratberg case the Supreme Court of North Dakota wrote an exhaustive opinion, holding Chapter 238, page 483, of the 1919 Session Laws of North Dakota, valid and not in conflict or contravention wth the 14th Amendment of the Constitution of the United States. The court in its opinion in that case so thoroughly and completely disposes of all of appellant's contentions in the instant case that we shall take the liberty of quoting here that part of the court's opinion which deals with the subject under consideration as the concluding part of our argument.

> "Second, the appellant contends that chapter 238 of the laws of 1919, which provides that 'any person * * * purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery for their own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased the purchaser may rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such personal property or his successor, and placing same at the disposal of the seller' is unconstitutional. It is appellant's contention that this law is in conflict with the Fourteenth Amendment of the Constitution of the United

States, and section 13 of the Constitution of North Dakota.

"There is nothing in the Fourteenth Amendment or in said section 13, which affects in any way the right of a state to make reasonable classifications. The Fourteenth Amendment does not prohibit reasonable classifications of persons and things for the purpose of legislation, but such classification is distinctly contemplated by the amendment. The state may classify persons and objects for the purpose of legislation if the classification is based on proper and justifiable distinction considering the purpose of the law. 'From the earliest days, classification has been made by legislatures whereby some people have rights or suffer burdens which others do not. It has been said that it is the essence of a classification that on one class are cast duties and burdens different from those resting on the general public and that the very idea of classification is that of inequality. The mere fact that legislation is based on a classification and is made to apply to certain classifications and not to others does not affect its validity if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions.' 6 R. C. L. 373, Sec. 369.

"In the instant case the law applies equally to all persons within the classification. It affects every seller of any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery in the same way. On the other hand, every person who purchases any of said machinery has the same privileges as every other purchaser of such machinery. There is no discrimination made between sellers. They all have the same burden, if it is a burden, and there is no discrimination between purchasers. Therefore it is a reasonable classification, and there was no error overruling the appellant's objections, or in refusing to give his instructions requested to be given to the jury on that subject.

"Section 2 of the act reads as follows: 'Any provision in any written order or contract of sale, or other contract which is contrary to any of the provisions of this Act is hereby declared to be against public policy and void.' It is the contention of appellant that both sections of the law interfere with the freedom of contract and are a violation of the Fourteenth Amendment of the Constitution of the United States and section 13 of the Constitution of the State of North Dakota, relying on Allgeyer v. Louisiana, 165 U. S. 583, 589-592, 17 S. Ct. 427, 41 L. Ed. 832; Adair v. United States, 208 U. S. 161, 172-174 28 S. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U. S. 1, 9, 17, 35 S. Ct. 240, 59 L. Ed. 441, L. R. A. 1915 C, 960; Adkins v. Children's Hospital, 261 U. S. 525, 545-553, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238.

"If the Legislature had authority to enact a law providing that any purchaser of any gas or oil burning tractor, gas or steam engine, harvesting or threshing machine for their own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased the purchaser may rescind the sale by giving notice within reasonable time,' it follows as a matter of course, that it would have authority to provide that any written order of contract of sale, or other contract which is contrary thereto, shall be void. The statutory provisions relating to a reasonable time for inspection and testing, and to a reasonable time for returning the machinery in case it is not reasonably fit for the purpose for which it was purchased if legal, becomes a part of every contract of sale of any such machinery, and, if the first section of chapter 238 is legal, section 2 is also legal. Section 2, however, does emphasize the necessity of such legislation as a police regulation and declares all orders and contracts contrary to any provisions of the act void as against public policy.

"It is well settled that a state may pass laws and police regulations for the prevention of fraud, regulating weights, measures, packages, inspection laws, substitutes, imitations, adulterations, forms of business liable to abuse, etc., but the loss occasioned by fraud which may be sustained in such business is merely nothing when compared to the loss which may be sustained by fraud and deceit in the purchase of farm machinery, in a great agricultural state like North Dakota. Even the "blue sky" laws regulating the sale of stocks is not so affected with a public interest as the sale of farm machinery in an agricultural country, and the state Legislature has a wide latitude in the enactment of police regulations affecting a public interest.

"In the case of Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 995, 1257, 32 L. Ed. 253, the court had under consideration a law enacted in the state of Pennsylvania prohibiting the sale of oleomargarine, a commodity intended as a substitute for butter. At the trial in the Pennsylvania court, the defendant offered to prove that it was made from pure animal fat, was clean and wholesome, containing the same elements as dairy butter; the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as butterine, and that this was increased by the introduction of milk and cream, so that the article contained all of the elements of butter produced from pure unadulterated milk or cream, except that the percentage of butterine was slightly smaller. On appeal to the Supreme Court of the United States, Powell v. Pennsylvania, supra, the court said: 'It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and

the public morals, it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designed to interfere with exercise of that power by the states. Mugler v. Kansas, 123 U. S. 663, 8 S. Ct. 273 (31 L. Ed. 205); Butchers' Union Company v. Crescent City Company, 111 U. S. 746, 751, 4 S. Ct. 652 (28 L. Ed. 585); Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357 (28 L. Ed. 923); Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064 (30 L. Ed. 220). * * * 'Every possible presumption,' Chief Justice Waite said, speaking for the court, in Sinking Fund Cases, 99 U. S. 700, 718 (25 L. Ed. 496), 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of ths salutary rule.' "

"The question was before the court again in the case of Schallenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49, and the court adhered to its former decision, but held that, when oleomargarine was an article of interstate commerce, it could be sold in the original package in Pennsylvania. The Legislature is vested with wide discretion in the enactment of necessary legislation in the interest of the general walfare of the people.

"In the case of People of the State of New York ex rel. Durham Realty Corporation v. Edward B. La Fetra, 230 N. Y. 429, 130 N. E. 601, 605, 16 A. L. R. 152, an act forbidding a landlord to take more than a reasonable rent for use of his property in a case of a housing shortage and forbidding the eviction of a tenant willing to pay a reasonable rent at the expiration of his term was held by the Supreme Court of the state of New York to be constitutional as not interfering with the right of contract. The court said: 'The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the ex-

ercise of its police power, although the rights of private property are thereby curtailed and freedom of contract is abridged. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596, 26 St. Ct. 341, 4 Ann. Cas. 1175; Rast v. Van Deman & L. Co., 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed. 679, L. R. A. 1917 A., 421, Ann. Cas. 1917 B, 455; American Coal Min. Co. v. Special Coal & Food Commission (D. C.) 268 F. 563.' Continuing, the court said: 'The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage, and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.' On appeal to the Supreme Court of the United States, the writ of error was dismissed October 10th, 1921, 257 U. S. 665, 42 S. Ct. 47, 66 L. Ed. 424. The District of Columbia passed a similar law, which was considered by the Supreme Court in the case of Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 459, 65 L. Ed. 865, 16 A. L. R. 165. In this case the court held that the law was not a violation of the Fifth Amendment to the Constitution, which amendment affects the power of the congress of the United States. The court said: 'The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions. * * * They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public

interest, * * * and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See, also, Noble State Bank v. Haskell, 219 U. S. 104, 110, 111, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912 A. 487.'

"In the case of Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527, 26 S. Ct. 301, 302, 50 L. Ed. 581, 4 Ann. Cas. 1174, the court said: 'The plaintiffs in error set up in their answer to the condemnation proceedings that the right of way demanded is solely for private use, and that the taking of their land for that purpose is contrary to the 14th Amendment of the Constitution of the United States. The mining company on the other hand, relies on the statutes of Utah, which provide that 'the right of eminent domain may be exercised in behalf of the following public uses: Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines.' * * * The single question, then, is the constitutionality of the Utah statute, and the particular facts of the case are material only as showing the length to which the statute is held to go. * * * The question, thus narrowed, is pretty nearly answered by the recent decision in Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085 (4 Ann. Cas. 1171). That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test.' These last two cases involve the right of eminent domain, which is not involved in the instant case, but they show how far Legislatures may go when necessary in the enactment of police regulations and yet be sustained by the highest court in the land.

"In the case of McLean v. State of Arkansas, 211 U. S. 539, 29 S. Ct. 206, 53 L. Ed. 315, the court said: 'Liberty of contract which is protected against hostile state legislation is not universal, but is subject to legislative restrictions in the exercise of the police power of the State. * * * The legislature of a State is primarily the judge of the necessity of exercising the police power and courts will only interfere in case the act exceeds legislative authority; the fact that the court doubts its wisdom or propriety affords no ground for declaring a state law unconstitutional or invalid. * * * Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract.'

"In Schmidinger v. City of Chicago, 226 U. S. 578, 33 S. Ct. 182, 57 L. Ed. 364, a law prescribing standard sizes of loaves of bread and prohibiting the sale of other sizes was sustained. The court said: 'There is no absolute liberty of contract, and limitations thereon by police regulations of the State are frequently necessariy in the interest of public welfare and do not violate the freedom of contract guaranteed by the Fourteenth Amendment. The ordinance of Chicago of 1908 enacted under legislative authority, fixing standard sizes of bread loaves and prohibiting the sale of other sizes, is not unconstitutional as depriving those dealing therein of their property without due process of law or as denying them equal protection of the law or as interfering with their liberty of contract,—affirming City of Chicago v. Schmidinger, 245 Ill. 317, 92 N. E. 244, and quoting from Gundling v. Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. Ed. 725, as follows: 'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their deter-

mination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.'

"In the case of Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 33 S. Ct. 44, 45, 57 L. Ed. 184, the court said: 'The state court, following its decision in Fuller v. City of Jackson, 97 Miss. 237, 52 So. 873, 30 L. R. A. (N. S.) 1078, construed the statute as prohibiting the sale of all malt liquors, whether in fact intoxicating or not, and this construction of the state law is binding there. The court said: 'Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such is prohibited from being sold in this state. The prohibition law cannot be made effective unless it excludes all subterfuges.' On appeal to the United States Supreme Court, 226 U. S. 192, 33 S. Ct. 44, 57 L. Ed. 184, the court held that the decision of the Mississippi court was binding on the United States Supreme Court. The case was tried on an agreed statement of facts; that Poinsetta was composed of pure distilled water to the extent of 90.45 per cent, the remaining 9.55 per cent being solids derived from cereals, 'which are in an unfermented state, and are wholesome and nutritious'; that 'it contains 5.73 per cent of malt, and is sold as a beverage'; that it does not contain either alcohol or saccharine matter; that it is not intoxicating; that it 'cannot be employed as a subterfuge for the sale of beer because it is bottled in a distinctive way and the name blown in the bottle.' The court said: 'It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effec-

tive. It does not follow that because a transaction, separately considered, is innocous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184 U. S. 425, 22 S. Ct. 425, 46 L. Ed. 623; Otis v. Parker, 187 U. S. 606, 23 S. Ct. 168, 47 L. Ed. 323; Ah Sin v. Wittman, 198 U. S. 500, 504, 25 S. Ct. 756, 49 L. Ed. 1142, 1144; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; Murphy v. California, 225 U. S. 623, 32 S. Ct. 697, 56 L. Ed. 1229 (14 L. R. A. (N. S.) 153).'

"In Booth v. Illinois, supra, the court said: 'It must be assumed that the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be attained and which it was competent for the state to accomplish.'

"In Armour & Co. v. State of North Dakota, 240 U. S. 510, 36 S. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916 D, 548, a North Dakota statute requiring lard when not sold in bulk to be put up in pails or other containers holding a specified number of pounds net weight or even multiples thereof and labeled as specified was upheld as not unconstitutional as denying equal protection of the law or as depriving the seller of their property without due process of law. In the case of State v. Armour, supra, 27 N. D. 177, 145 N. W. 1033, L. R. A. 1916 E, 380, Ann. Cas. 1916 B, 1149, this court held that under the police power the state can interfere with private rights when necessary to protect the public from fraud or opportunity for fraud.

"In the case of Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A. L. R. 219, this court said: 'The police power of the state is not limited to regulations necessary for the preservation of good order or the public health or safety. The prevention of fraud and deceit, cheating and

imposition, and unfair competition are equally within its province.'

"We have not overlooked the case of Burns Baking Co. v. Bryan, 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813, 32 A. L. R. 661, wherein the court held: 'A statute requiring bread in quantities of twenty-five loaves to maintain a specified weight twenty-four hours after baking, with a limit of variation so narrow that it can be maintained only by wrapping the bread, or by other artificial means, is unreasonable and void.' Since the weight required could only be maintained by artificial means, it was held to be unreasonable, and the unreasonableness of a police regulation is always involved.

"In the case of Weaver v. Palmer Brothers Co., 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654, a law prohibiting the use of shoddy in the manufacture of comfortables for beds was not sustained as necessary to prevent deception, since purchaser may be protected by the requirements of designation of material entering into their manufacture. The court points out specifically that the public might be protected against fraud or deception by requirements of designation of materials. If the law instead of prohibiting the sale had only required "shoddy" to be sold as 'shoddy,' it would have been sustained.

"The case of Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280, is not in point. In that case the law took from the parties the right of contract and placed it in a court making the parties subject thereto.

"In the case of Chicago, B. & Quincy R. R. Co. v. McGuire, 219 U. S. 549, 31 S. Ct. 259, 55 L. Ed. 328, the court had under consideration a statute from Iowa providing: 'Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other

employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.' To this law there was an amendment in 1898, 'nor shall any contract of insurance relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance relief, benefit or indemnity by the person injured, * * * constitute any bar or defense to any cause of action brought under the provisions of this section.' It was claimed that the statute was repugnant to the Fourteenth Amendment of the Constitution of the United States as an unwarranted interference with liberty to make contracts, and, second, as a denial of the equal protection of the laws. The Iowa court held that the law was constitutional. McGuire v. C. B. & Q. R. R. Co., 131 Iowa 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706, and Id., 138 Iowa 664, 116 N. W. 801. On Appeal, 219 U. S. 549, 31 S. Ct. 259, 261, 55 L. Ed. 328, Judge Hughes (now Chief Justice) said: 'The first ground of attack is that the statute violates the 14th Amendment by reason of the restraint it lays upon liberty of contract. This section of the Code of Iowa (Sec. 2071), as originally enacted, imposed liability upon railroad corporations for injuries to employees, although caused by the negligence or mismanagement of fellow servants. And it was held by this court that it was clearly within the competency of the legislature to prescribe this measure of responsibility. Minneapolis & St. Louis Railway Co. v. Herrick, 127 U. S. 210, 8 S. Ct. 1176, 32 L. Ed. 109, following Missouri Railway Co. v. Mackey, 127 U. S. 205, 8 S. Ct. 1161, 32 L. Ed. 107. The statute in its original form also provided that 'no contract which

restricts such liability shall be legal or binding.' * * * But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. Crowley v. Christensen, 137 U. S. 89, 11 S. Ct. 13, 34 L. Ed. 620; Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. 'It is within the undoubted power of government to restrain some individuals from all contracts as well as all individuals from some contracts. * * * And, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.' Frisbio v. U. S., 157 U. S. 165, 166, 15 S. Ct. 586, 39 L. Ed. 658, 659. * * * The principle was thus stated in McLean v. Arkansas, 211 U. S. 547, 548, 29 S. Ct. 206, 53 L. Ed. 315. 'The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such acton was arbitrary interference with the right to

contract or carry on business and having no just relation to the protection of the public within the scope of legislative power, the act must fail.' * * * But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality.'

"In the case of Erie R. R. Co. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, the court had under consideration a law of the state of New York requiring 'every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm or corporation, engaged in or upon any public work for the state or any municipal corporation thereof, either as a contractor or a sub-contractor therewith, shall pay to each employee engaged in his, their or its business the wages earned by such employee in cash. No such company, person, firm or corporation shall hereafter pay such employees in script, commonly known as store money-orders.' The court said: 'While it is a fundamental principle that personal liberty includes the power to make contracts, the liberty of making contracts is subject to conditions in the interest of the public welfare. * * * Each act of legislation has the presumption that it has been enacted in the public interest and the burden is on him who attacks it. The burden of the party attacking a police regulation as unconstitutional under the due process clause is not sustained by the mere principle of liberty of contract; it can only be sustained by showing that the statute conflicts with some constitutional restraint or does not subserve the public welfare. The legislature is the judge in the first instance of whether a police regulation is necessary; judicial review is limited, and even an earnest conflict of public opinion does not bring the question of necessity within the range of judicial cognizance.'

"In the case of Wanberg v. National Union Fire Insurance Co., 46 N. D. 369, 179 N. W. 666, this court had before it for construction section 4902, Comp. Laws 1913, which provides that 'every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company,' and it was held, that this was a reasonable requirement. In affirming the decision of this court on appeal, 260 U. S. 71, 43 S. Ct. 32, 34, 67 L. Ed. 136, Judge Taft said: 'The legislature was evidently convinced that it would help the public interest if farmers could be induced generally to take out hail insurance and 'temper the wind' so injurious to the agriculture of the state, and that they would be more likely to avail themselves of this protection if they could effect the insurance promptly. * * * The Legislature said, therefore, to companies intending to engage in hail insurance: 'To accomplish our purpose we forbid you to engage in this kind of business unless you agree to close your contracts within 24 hours after application is made. You must so extend the scope of the authority of your local agents, or must so speed communication between them and your representatives who have authority, as to enable an applicant to know within the limits of a day whether he is protected, so that, if not, he may at once go to another company to secure what he seeks. If, therefore, you engage in this exigent business, and allow an application to pend more than 24 hours, you will be held to have made the contract of insurance for which the farmer has applied.' * * * It is pointed out on behalf of the company that the very application which the defendant in error signed contained an express consent that the policy should not take effect until the company's agency at Waseca, Minn., should have an opportunity to examine it and should accept it. It is clear that, if the statute is valid, such a consent is void, because it defeats the very object of the statute. This is

settled by Whitfield v. Aetna Life Insurance Co., 205 U. S. 489, 27 S. Ct. 578, 51 L. Ed. 895, and Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. Ed. 552.'

"In Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750, 39 A. L. R. 760, the Ohio court upheld an ordinance providing, among other things, that no jewelry shall be sold at auction for a period greater than sixty days in one year, and that the auctioneer must have been a resident of the municipality for one year, and must have had a regular stock of jewelry for six months of that year, a valid enactment not in conflict with the provisions of article 1 of the Constitution of Ohio, and Fourteenth Amendment of the Constitution of the United States.

"In the case of Hutchinson Ice Cream Co. et al. v. State of Iowa, 242 U. S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643, the court held as valid 'laws forbidding the sale, offering for sale, etc., as "Ice Cream" of any article not containing butter-fat in reasonable proportion. * * * The fact that the name "Ice Cream," as commonly used, includes many compounds which are entirely wholesome yet contain no cream or butter-fat, does not render such legislation arbitrary or unreasonable, but tends rather to support it as serving to prevent the public from being misled in the purchase of a food article of general consumption.'

"In the cases of Merrick v. Halsey & Co., 242 U. S. 568, 37 S. Ct. 227, 230, 61 L. Ed. 498; Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; and Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559, 37 S. Ct. 224, 61 L. Ed. 493, the court had before it the "Blue Sky" Laws of South Dakota, Ohio, and Michigan, all of which were upheld. In the Merrick Case the court said: 'But it is to be borne in mind that the policy of a state and its expression in laws must vary with circumstances. And this capacity for growth and adaption we said, through Mr. Justice

Matthews, in Hurtado v. California, 110 U. S. 516, 530, 4 S. Ct. 111, 292, 28 L. Ed. 232, 237, is the 'peculiar boast and excellence of the common law.' It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer in Muller v. Oregon, 208 U. S. 412, 420, 28 S. Ct. 324, 52 L. Ed. 551, 555, 13 Ann. Cas. 957, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does not mean that the form is so rigid as to make government inadequate to the changing condition of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies if not exact examples to guide us. So guided and so informed, we think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that, under its forms, dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. * * * 'Can the occasional fraud, that fraud which arises in the individual transaction, justify a law regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business,—a fraud which the business itself, from its character and the manner in which it is generally conducted, invites and encourages?' And, quoting from People ex rel. Tyroler v. Warden, 157 N. Y. 116-123, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763: 'It is a novel legislation, indeed, that attempts to take away from all the people the right to conduct a business because there are wrongdoers in it.' To the latter we say the right to do business is not taken away; the other we have already answered and need only add that we cannot, upon such considerations, limit the power

of the state. The state must adopt its legislation to evils as they appear, and is not helpless because of their forms.' Engel v. O'Malley, 219 U. S. 128, 31 S. Ct. 190, 55 L. Ed. 128; Allen v. Riley, 203 U. S. 347, 27 S. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137; Brazee v. Michigan, 241 U. S. 340, 36 S. Ct. 561, 60 L. Ed. 1034; Brodnax v. Missouri, 219 U. S. 385, 285, 31 S. Ct. 238, 55 L. Ed. 219.

"In the case of Otis v. Parker, 187 U. S. 606, 23 S. Ct. 168, 47 L. Ed. 323, article 4, Sec. 26, of the Constitution of California, providing that all contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party claiming it by suit, was upheld as not in conflict with the Fourteenth Amendment, although the provision may be construed to apply to bona fide as well as to gambling contracts.

"In the case of State of New Hampshire v. Prince, 77 N. H. 581, 94 A. 966, L. R. A. 1916 A, 950, a law forbidding the sale or exchange under penalty, of any animal unfit for labor, was upheld. Briefly stated, the due process clause of the Federal Constitution is not intended to interfere with the power of the State in the exercise of its police power, to prescribe regulation for the protection and promotion of the welfare of the people. Property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. It is, however, subject to the qualification that the measures adopted for the purpose of regulating the exercise of the rights of liberty and the use and enjoyment of property must be designed to affect some public object which the government may legally accomplish, that they must be reasonable and have some direct, real, and substantial relation to the public object sought to be accomplished, and that the governmental power is not to be arbitrarily or colorably exercised or

used as a subterfuge for oppressing some individual or class of individuals.

"We are of the opinion that chapter 238 of the Session Laws of 1919 is a reasonable regulation of the sale of certain kinds of farm machinery; that it is designed to effect a public object and has a real and substantial relation to the public object sought to be accomplished. The record in this case shows that four "combines" were sold at the same agency, on the same day, to four different men in the same neighborhood; that all had the same trouble; that none of the machines were reasonably fit for the purpose for which they were purchased, and we must assume from the enactment of the law with its declaration 'that all contracts contrary thereto, are void as against public policy'; that there was a widespread demand for the enactment of the law as a police regulation for the protection and promotion of agriculture in the state, and it is not in conflict with the due process clause of the Constitution of the United States or the Constitution of North Dakota." Bratberg v. Advance-Rumley Thresher Co., 238 N. W. 552, page 561 to 567 inclusive.

CONCLUSION.

In conclusion permit us to state that from the cases cited above, and especially the Bratberg case, it is clear that Chapter 238, page 483, 1919 Session Laws of North Dakota, is valid and is an honorable exercise of the regulatory and police power of the state legislature, enacted for the purpose of preventing the perpetration of fraud. It does not deprive any honest dealer of any property rights, but compels high-pressure salesmen, dealers and manufacturers to deal honestly and fairly with their customers. From these cases it is clear that the state legislature is primarily the judge of the existence of the evil and having determined that an evil exists, it has

power to remedy it by proper legislation. Such legislation, unless unreasonable, will be sustained as not in violation of the Fourteenth Amendment of the Constitution of the United States.

From the authorities cited it is clear that this Court will take the interpretation and application of Chapter 238, page 483, 1919 Session Laws of North Dakota, in relation to the Fourteenth Amendment of the constitution of the United States, from the highest Court within the state. The reason and necessity for such legislation is primarily a question for the legislature and the highest court of the state to determine, and such determination will not be disturbed by this Court, unless unreasonable and clearly in violation of the Fourteenth Amendment of the Constitution of the United States. It will not be disturbed if its aim and purpose is reasonably calculated to prevent fraud and to be for the public good. The Fourteenth Amendment cannot be used as a shield for fraud.

To contend that a dealer or a farm machinery manufacturing company should be permitted to sell machinery not reasonably fitted for the purpose for which it was purchased is equivalent to a fraud and to misrepresentation and deception, which is sought to be prevented by the legislation here in question.

Respectfully submitted,

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